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Issue Date: 19 July 2006

CASE NO. 2000-BLA-00348

In the Matter of:

KENNETH L. ATKINS,
Claimant

v.

WESTMORELAND COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

DECISION AND ORDER ON REMAND

This proceeding is before me upon a third remand from the Benefits Review Board. The claim is a duplicate claim. In the prior claim, Administrative Law Judge Vivian Schreter-Murray found Claimant had established thirty-eight (38) years of coal mine employment and simple pneumoconiosis which arose out of pneumoconiosis by chest x-ray evidence and medical opinion reports under subsections 718.202(a)(1); 718.202(a)(4); and 718.203. Administrative Law Judge Schreter-Murray found Claimant had not established total disability, however, and therefore she denied the claim for benefits. That determination was affirmed by the Benefits Review Board on September 29, 1997 and Claimant took no further action on that initial claim for benefits.

Claimant filed a duplicate claim for benefits on March 9, 1999. On October 30, 2000, after a thorough and detailed discussion of the evidence, Administrative Law Judge Stuart Levin found the evidence was sufficient to establish the presence of complicated pneumoconiosis and, therefore, the irrebuttable presumption of total disability. As such, he found a material change in conditions had been established so the claim was not denied on the basis of the prior denial pursuant to Section 725.309. Furthermore, since Judge Levin found the irrebuttable presumption had been invoked which establishes total disability due to pneumoconiosis, he awarded benefits.

Employer appealed and on January 18, 2002, the Board remanded for reconsideration. The Board concluded Judge Levin did not adequately explain why the fact that Dr. DePonte's

simultaneous x-ray readings which revealed a Category A large opacity were entitled to additional probative weight or weight over other contrary x-ray readings submitted by Employer from Drs. Scott and Kim, who were similarly qualified and who consistently read x-ray films, albeit not simultaneously as revealing no Category A, B, or C opacities. In addition, the Board found Judge Levin improperly concluded that medical opinions finding that Claimant did not have a respiratory or pulmonary impairment were not relevant to determining whether the existence of complicated pneumoconiosis was established. The Board stated that Judge Levin's determination to refuse to consider the medical opinions of Drs. Fino and Dahhan that specifically opined that Claimant did not have complicated pneumoconiosis based, in part, on the fact that he did not have respiratory or pulmonary impairment appeared to substitute Judge Levin's medical opinion for that of the experts.

In a Decision and Order issued on remand on August 22, 2002, Judge Levin again found complicated pneumoconiosis was established. Judge Levin carefully and thoroughly discussed the x-ray evidence and medical opinion reports in this decision on remand. He stated his review of the physicians' opinions indicated there had been four disease processes cited as possible explanation for the changes all physician agree were present in the Claimant's right upper lung: 1) granuloma – possibly histoplasmosis, but most likely tuberculosis; 2) pneumonia; 3) cancer (neoplasm); or 4) complicated pneumoconiosis (large opacity A). Judge Levin rejected pneumonia and cancer since serial x-ray reviews all concluded these conditions were unlikely given the stability of the large abnormality.

Judge Levin noted Drs. DePonte, Wiot and Wheeler were all qualified as board-certified radiologists and B-readers. These physicians all read a series of x-rays and looked at these x-ray films themselves. Dr. DePonte's opinion weighed in favor of complicated pneumoconiosis while Drs. Wiot's and Wheeler's opinion weighed in favor of old granulomatous disease or tuberculosis. Judge Levin noted only Dr. DePonte, however, reviewed the series of x-ray films simultaneously. Judge Levin found that the memories of Drs. Wiot and Wheeler of Claimant's past x-ray films was a less reliable basis for determining what a series of x-ray films may reveal than Dr. DePonte's simultaneous readings. Therefore, Judge Levin again found Dr. DePonte's reading more persuasive. In addition, Judge Levin found that Section 718.304(a) specifically provides that when x-ray evidence reveals one or more opacity of 1 centimeter or more an "irrebuttable presumption" is invoked that the Claimant is totally disabled. Consequently, Judge Levin noted that the when the irrebuttable presumption is invoked by x-ray, the Board failed to explain how it may be rebutted by medical opinion evidence that Claimant is not totally disabled by a pulmonary or respiratory impairment. Judge Levin also stated, "Should the Board continue to hold to the view that evidence relating to the degree of impairment is relevant to refute the x-ray classification system set forth in the regulations or to rebut the heretofore irrebuttable presumption established by x-ray under Section 718.304, further analytical guidance from the Board will be needed setting forth the factors the Board deems appropriate in accepting a medical opinion assessing the degree of disability as refutation of the regulations or rebuttal of what the regulations describe as an irrebuttable presumption." Therefore, based on his finding the more persuasive x-ray readings of Dr. DePonte established complicated pneumoconiosis and invoked the irrebuttable presumption of Section 718.304, Judge Levin again awarded benefits.

Employer again appealed and on September 9, 2003, the Board issued its second decision and order on remand. The Board found that both Drs. DePonte and Wheeler observed and commented on the same lesion stability but disagreed as to what the observed stability meant diagnostically. The Board found on the facts, they were unable to discern the significance of Judge Levin's observation that Dr. Wheeler's and Dr. Wiot's memories may be a less reliable basis for determining what a series of x-rays may reveal since Dr. Wheeler observed and commented on the same lesion stability that Dr. DePonte detected in her simultaneous review of the x-rays. The Board also found Judge Levin erred in failing to explain how he weighed the readings of Drs. Scott, Kim, Spitz, Shipley, Binns, Gogineni, and Baek all of whom diagnosed no complicated pneumoconiosis but instead described granulomatous disease, tuberculosis or cancer. The Board also agreed with Employer that Judge Levin did not carry out the Board's instructions to consider the medical opinions that Claimant has no impairment in determining whether the existence of complicated pneumoconiosis was established pursuant to Section 718.304. The Board stated that all of the evidence relevant to the presence or absence of complicated pneumoconiosis pursuant to Section 718.203(a) – (c) must be considered and weighed together. The Board also stated that while a Claimant is not required to prove the existence of a totally disabling respiratory or pulmonary impairment in order to invoke the irrebuttable presumption under Section 718.304, it does not follow that medical opinions of no complicated pneumoconiosis based in part on the absence of impairment are irrelevant to whether the existence of complicated pneumoconiosis is established. The Board noted the Fourth Circuit has stated that other evidence may show that x-ray opacities "are not what they seem to be . . . " *Eastern Associated Coal Corp. v. Director, OWCP [Scarbo]*, 200 F.3d 250 at 256, 22 BLR 2-93 at 101 (4th Cir. 1999).

Administrative Appeal Judge McGranery dissented from the majority Board opinion and found Judge Levin thoroughly analyzed all the x-ray readings and physician statements of record. Judge McGranery also concluded Judge Levin fully explained
why he credited Dr. DePonte's readings over those of the other dually qualified radiologists. Judge McGranery strongly disagreed with the assertion in the majority opinion that Judge Levin disobeyed the Board's instruction to consider the medical opinions that Claimant has no impairment in determining whether the existence of complicated pneumoconiosis was established at 20 C.F.R. § 718.304. Judge McGranery noted Judge Levin reasonably asked for analytical guidance in the use of this evidence since the Fourth Circuit has held that a medical opinion on the existence of complicated pneumoconiosis is relevant only insofar as it addresses the statutory-regulatory criteria and neither the statute nor the regulation requires the existence of an impairment.

On October 18, 2004, Judge Levin issued a second Decision and Order on Remand and again found that complicated pneumoconiosis was established. To clarify his previous finding that Dr. DePonte's reading of several x-ray findings simultaneously was more persuasive than the other x-ray reports of record, Judge Levin noted that numerous physicians indicated on their x-ray reports that comparison films would be helpful in assessing the changes seen in Claimant's x-ray reports in his right upper lung. In addition, Judge Levin noted Dr. Wiot stated at his deposition that reviewing a series of x-rays simultaneously is always better than reviewing one x-ray film. Judge Levin also noted that the readings by other physicians that complicated pneumoconiosis was not present but rather the etiology of the changes in Claimant's right upper

lungs was granulomatous disease, tuberculosis, or cancer were made by physicians who also concluded simple pneumoconiosis was not present. Judge Levin concluded these physicians' findings were are less credible since they are at odds with the finding of simple pneumoconiosis which was made in the initial claim for benefits and that finding was affirmed by the Board in earlier proceedings. Judge Levin stated common sense suggests that it would be difficult for a physician to properly assess whether complicated pneumoconiosis is present if he/she does not believe simple pneumoconiosis is present. *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994). Judge Levin also reiterated his earlier notation that there is no evidence in this case that this non-smoking miner was treated for tuberculosis or had developed cancer. He also stated those facts also supported his determination to accord less weight to the reports which attribute the changes to tuberculosis or cancer.

Finally, on consideration of the medical reports which conclude the miner does not have a respiratory or pulmonary impairment and, therefore, does not have complicated pneumoconiosis, Judge Levin also found those reports entitled to less weight. Judge Levin noted these reports are based, in part, on findings that Claimant does not have pneumoconiosis. Under these circumstances, Judge Levin found the x-ray reports which invoke the irrebuttable presumption are not outweighed by these contrary medical opinion reports which are based, in part, on a finding contrary to findings established in this case. Therefore, Judge Levin again found the irrebuttable presumption of total disability due to pneumoconiosis set forth at Section 718.304 is invoked by the probative and persuasive evidence of record, specifically the x-ray reports of Dr. DePonte which outweigh the contrary evidence of record. Thus, Judge Levin again found that Claimant had established a material change in conditions or a change in one of the applicable conditions of entitlement as required by Section 725.309(d). Accordingly, Judge Levin concluded his claim would not be denied on the basis of the prior denial. Judge Levin concluded that Claimant had now established the presence of pneumoconiosis which arose out of coal mine employment and total disability due to such pneumoconiosis and, therefore, he found Claimant entitled to benefits under the Act.

The Board has now remanded this matter for the third time. In the third Decision and Order on remand, issued on October 13, 2005, the Board granted Employer's request to reassign this case since the Board concluded that "review of this claim requires a fresh look at the evidence . . . " *Millburn Colliery Co. v. Hicks,* 138 F.3d 524, 537, 21 BLR 2-2323, 2-343 (4th Cir. 1998); *see* 20 C.F.R. §§ 802.404(a), 802.405(a). Subsequently, the matter was reassigned to the undersigned by Order dated February 8, 2006. The parties were allowed thirty days to submit written briefs on the issues remanded by the Board for reconsideration. Neither party has submitted a written brief.

In its Decision and Order on Remand issued on October 13, 2005, the Board initially rejected Judge Levin's reasoning that negative readings for complicated pneumoconiosis were given less weight since they were at odds with the finding of simple pneumoconiosis which was made in the initial claim for benefits and which was affirmed by the Board. The Board stated that for collateral estoppel to apply, Claimant must establish, inter alia, that the issue determined in the prior proceeding was a critical and necessary part of the judgment in the prior proceedings. The Board stated that the finding of the existence of simple pneumoconiosis in claimant's prior

claim was not essential to the judgment denying benefits. Since Judge Levin had not made any finding that the existence of simple pneumoconiosis was established, he erred in discrediting the negative readings of complicated pneumoconiosis because they conflicted with a finding that the existence of simple pneumoconiosis had been established.

The Board also found Judge Levin failed to discuss how he weighed Dr. Wheelers' testimony that nine out of ten people with tuberculosis self-cure without treatment if their immune systems are normal. Because the administrative law judge did not consider this relevant expert testimony and explain the weight accorded to it, the Board stated they were unable to affirm the alternative rationale for discounting the negative x-ray readings. Again, the Board also found Judge Levin's rationale for crediting Dr. DePonte's simultaneous readings was the same rationale he gave in his initial decision issued on October 30, 2000, which the Board held was inadequate to explain the weight accorded to the conflicting readings by radiological experts. Thus, the Board again found they were unable to determine whether substantial evidence supported the administrative law judge's finding. The Board noted in particular that Dr. DePonte made a comparison and concluded that the lesion she saw on the May 3, 1999 x-ray film was present on earlier films and was stable, a factor that tended to rule out cancer and made the lesion more likely a conglomerate mass of pneumoconiosis. The Board noted that Dr. Wheeler observed the same lesion stability and interpreted its diagnostic significance as tending to confirm healed tuberculosis. The Board concluded that the administrative law judge's rationale for crediting Dr. DePonte's x-ray reading does not resolve this conflict in the evidence. Consequently, the Board vacated the finding pursuant to Section 718.304(a) and remanded the case for reconsideration of the x-ray readings with full explanation of the relative weight accorded to the conflicting readings.

The Board also rejected Judge Levin's rationale for discounting the medical opinion reports of Drs. Castle, Chillag, Dahhan, Fino and Jarboe that Claimant does not have complicated pneumoconiosis since they were based, in part, on finding that Claimant does not have pneumoconiosis which ran contrary to findings established in this case. The Board found this conclusion was flawed for reasons similar to those set forth above. Therefore, the Board vacated the findings pursuant to Section 718.304(c) and remanded the matter for reconsideration of the medical opinion evidence. Finally, the Board again vacated the issue of the onset date since the finding of complicated pneumoconiosis was vacated.

Judge J. McGranery again dissented from the majority's decision. Judge McGranery stated that when confronted with forty-nine interpretations of seven x-rays by well qualified experts with conflicting opinions, the ALJ conscientiously considered the x-ray reports of record. She noted that the expert evidence of record supports Judge Levin's explanation that the simultaneous x-ray readings by Dr. DePonte are more credible. Judge McGranery also noted Judge Levin resolved the conflict between Dr. Wheeler and Dr. DePonte since Dr. Wheeler discounted a diagnosis of pneumoconiosis because the opacity was only in the right upper lobe, whereas complicated pneumoconiosis is always symmetrical. Judge Levin noted that Dr. Wiot's testimony, however, indicates that this not necessarily the case although it often is. In addition, Judge McGranery noted this reason, which was questionable, is also at odds with the medical science underlying the statue which requires a finding of only one large opacity. Judge McGranery also agreed with Judge Levin's rejection of the medical opinions of Drs. Castle,

Chillag, Dahhan and Fino who required a finding of pulmonary or respiratory impairment to diagnose complicated pneumoconiosis. She noted that although a respiratory impairment may be relevant to a medical finding of complicated pneumoconiosis, it has no relevance to a legal finding under the statute or the regulation. Judge McGranery stated, "As the administrative law judge correctly observed, 'using the failure to show total disability under §718.204 as the basis for concluding that complicated pneumoconiosis does not exist, would in effect, turn the §718.304 presumption into a rebuttable presumption.'" Judge McGranery found that the ALJ's discounting of these medical opinions demonstrated a proper application of the statute, regulation and case law.

Judge McGranery agreed, however, that the Board and the ALJ have reached an impasse. She stated in her opinion, that is due to the Board's failure to give due deference to the ALJ's role in weighing the medical evidence and misapprehension of the relevant law. Given the majority's instructions, Judge McGranery stated, the new ALJ will be left with little choice other than to deny benefits. She noted further, when the Board affirms that decision, Claimant can obtain review in the Fourth Circuit where she would hope the Court would reverse the Board and remand the case with instructions to reinstate the ALJ's initial decision.

Upon review of all of the medical evidence, the extensive decisions by Administrative Law Judge Levin and the Board, I find Judge McGranery's analysis cogent and persuasive. I agree with her analysis that Judge Levin did thoroughly and adequately explain the basis for his finding that the simultaneous x-ray readings by Dr. DePonte are more credible. However, as noted by Judge McGranery in her dissent, the Board's instructions indicate that the simultaneous x-ray readings by Dr. DePonte are equally credible with the series of x-ray readings by Dr. Wheeler which also noted the stability of the lesion. Based on the Board's instructions and rejection of Judge Levin's rationale, I find the x-ray readings of Dr. DePonte equally credible with the x-ray readings of Dr. Wheeler. Since these equally credible readings by the highly qualified physicians reach opposite results, I find that the persuasive x-ray evidence is evenly balanced. Under such circumstances, when the evidence is evenly balanced, the benefits claimant must lose since he bears the burden of persuasion. Thus, I find Claimant has not established total disability by establishing complicated pneumoconiosis under the provisions of Section 718.304.

Moreover, I note that the Board directed a discussion of *Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000) wherein it noted that the Fourth Circuit "held that x-ray evidence which displays opacities exceeding one centimeter does not lose its probative force if other evidence is inconclusive or less vivid, (but) the court explicitly recognized that x-ray evidence can lose its force if other evidence affirmatively shows that the opacities are not there or are not what they seem to be . . .." While Judge McGranery in her dissent stated that Judge Levin did analyze the x-ray evidence under the *Scarbro* standard and found evidence offered by Employer's experts as too speculative to counter findings of complicated pneumoconiosis, I note that the Board has stated that "[w]hile the x-ray readings submitted by employer all found evidence of an abnormality, which some of them noted was an opacity or mass from two centimeters up to four centimeters in size, all of the readings submitted by employer in this case specifically opined that the abnormality, opacity or mass, whatever its size, was not one which would be classified as a Category A, B, or C opacity, which is necessary

in order to trigger the irrebuttable presumption at Section 411(c)(3) of the Act." In particular, the Board noted that Drs. Scott, Kim, Spitz, Shipley, Binns, Gogineni, and Baek found no Category A, B, or C large opacities and "attributed the abnormality they found to old granulomatous disease, tuberculosis and/or cancer, but not complicated pneumoconiosis." While Judge Levin found that these physicians' opinions were too speculative to satisfy the *Scarbro* standard, I find that complicated pneumoconiosis is not established based on the Board's findings and its interpretation of *Scarbro*. Said differently, Employer's experts' opinions are sufficient to affirmatively establish that the opacities in the miner's lungs are not coal dust related.

Based on the foregoing, the chest x-ray evidence does not support a finding of complicated pneumoconiosis. Medical opinions preponderantly find the absence of complicated pneumoconiosis and these opinions are supported by a preponderance of the chest x-ray evidence as previously noted and Claimant has not demonstrated the presence of complicated pneumoconiosis pursuant to the Board's instructions under *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000).

As noted by Judge Levin in his prior determinations on this second claim for benefits, the evidence of record is not sufficient to establish total disability under the provisions of Section 718.204 independent of the Section 304 presumption. Therefore, I find Claimant has not established a change in an applicable condition of entitlement since he has not established that he is now disabled by the simple pneumoconiosis which arose out of pneumoconiosis as established in his prior claim for benefits. Accordingly, this claim for benefits shall be denied on the basis of the prior denial pursuant to Section 725.309.

ORDER

IT IS ORDERED that the claim of Kenneth L. Atkins for benefits under the Act is hereby DENIED.

A

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is:

Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).